

FILED BY *J* D.C.

IN THE UNITED STATES DISTRICT COURT
 FOR THE WESTERN DISTRICT OF TENNESSEE
 WESTERN DIVISION

| | | |
|---------------------------------|---|-----------------------|
| POWER & TELEPHONE SUPPLY |) | ROBERT B. DI TROlio |
| COMPANY, INC., |) | CLERK, U.S. DIST. CT. |
| |) | W.D. OF TN, MEMPHIS |
| Plaintiff, |) | |
| |) | |
| v. |) | No. 03-2217 M1/V |
| |) | |
| SUNTRUST BANKS, INC., SUNTRUST |) | |
| BANK, SUNTRUST BANK-ATLANTA, |) | |
| SUNTRUST BANK-NASHVILLE, N.A., |) | |
| SUNTRUST EQUITABLE SECURITIES |) | |
| CORPORATION, and |) | |
| SUNTRUST CAPITAL MARKETS, INC., |) | |
| |) | |
| Defendants. |) | |

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Before the Court is Defendants' Motion for Summary Judgment, filed on January 18, 2005. Plaintiff responded in an opposition received on March 4, 2005. A reply was received from Defendants on March 28, 2005. For the following reasons, the Defendants' motion is GRANTED.¹

I. BACKGROUND

This action arises out of a financial transaction between the parties involving interest rate swap agreements.

A. Factual Background

The facts of this case are well chronicled in the Court's

¹ As noted in Section III(D) of this order, Defendants' motion for summary judgment with respect to their counterclaims for indemnification will be addressed in a separate order.

December 27, 2004, Dismissal Order. (Order Granting in Part and Den. in Part Defs.' Mot. to Dismiss of Dec. 27, 2004 (Docket No. 236).) The Defendant SunTrust entities began doing business with Plaintiff in 1996 at which time Defendants became a participant in Plaintiff's syndicated line of credit.² Plaintiff utilizes its syndicated line of credit to obtain working capital to fund its inventory purchases.

In September of 1996 and January of 1997, Defendants made presentations to Plaintiff highlighting the types of services and products offered by the Defendants.³ (Pl.'s Third Am. Compl. Exs. A and B (Docket No. 180).) Eventually Defendant SunTrust Bank-Nashville became Plaintiff's primary bank and either provided requested services to Plaintiff or referred Plaintiff to another SunTrust Entity to provide requested services. Plaintiff established a syndicated line of credit with a variable interest rate with Defendant SunTrust Bank-Nashville in November of 1998

² Defendants provide the following outline of the relationships between the Defendant entities. SunTrust Capital Markets, Inc., is successor to SunTrust Equitable Securities Corporation and is a wholly owned subsidiary of SunTrust Banks, Inc. SunTrust Bank is a wholly owned subsidiary of SunTrust Banks, Inc. SunTrust Bank consolidated SunTrust Bank-Atlanta and SunTrust Bank-Nashville on January 1, 2000, and both were wholly owned subsidiaries of SunTrust Banks, Inc.

³ A review of the September 16, 1999, presentation given to Plaintiff by Defendant SunTrust Capital Markets reveals that it is a sales presentation which explains the types of products and services offered by Defendants to its clients and outlines transactions performed by Defendants for other SunTrust clients.

and increased the line of credit in October of 2000. The swap agreements upon which this action is based are related to the interest rates associated with these syndicated lines of credit.

In April of 1997, Defendant SunTrust Bank-Nashville and Defendant SunTrust Equitable Securities Corporation approached Plaintiff about hedging the interest rate on its syndicated line of credit but Plaintiff decided to purchase a five-year interest rate cap from First Tennessee Bank rather than a product from Defendants. In 1999, Defendant SunTrust Equitable Securities Corporation made a presentation to Plaintiff explaining interest rate swap agreements. (Id. Ex. E.)

In July of 1999, Plaintiff entered into an interest rate swap agreement with Defendants at a fixed rate of 6.56% on the notional amount of twenty millions dollars for a five year term to hedge against the interest rate on its syndicated line of credit ("1999 Swap Agreement"). (Id. Ex. F.) In July of 2000, Plaintiff entered into a second swap agreement with a fixed interest rate of 7.37% and a variable rate equal to London Interbank Offered Rate on the notional amount of twenty million dollars (the "2000 Swap Agreement"). (Id. Ex. H.)

The Swap Agreements were favorable to Plaintiff until interest rates dropped dramatically between the years 2000 and 2002, causing Plaintiff to have to make payments to Defendants under the terms of the Agreements. During the same time period,

Plaintiff's borrowing declined until Plaintiff was no longer borrowing on its syndicated line of credit. However, because the Swap Agreements remained in effect, Plaintiff was required to continue making payments to Defendants. Plaintiff contends that it was damaged in excess of six million dollars due to the drop in interest rates. (Pl.'s Third Am. Compl. ¶ 66.) In October of 2002, Plaintiff paid Defendants \$3,472,500 to terminate the 1999 and 2000 Swap Agreements. (Id. ¶ 63.)

B. Procedural Background

On May 4, 2004, Plaintiff filed its Third Amended Complaint in this action. (Pl.'s Third Am. Compl.) In its Third Amended Complaint, Plaintiff asserted claims against Defendants based on the theories of breach of fiduciary duty, breach of contract, agency, misrepresentation, negligence, violation of the Tennessee Consumer Protection Act, common law suitability, and tying under the Bank Holding Company Act.

On May 24, 2004, Defendants moved to dismiss each of Plaintiff's claims. (Defs.' Mot. to Dismiss Third Am. Compl. (Docket No. 191).) The Court filed an Order Granting in Part and Denying in Part Defendants' Motion to Dismiss on December 27, 2004. (Order Granting in Part and Den. in Part Defs.' Mot. to Dismiss of Dec. 27, 2004 (Docket No. 236).) In its December 27, 2004, Dismissal Order the Court dismissed Plaintiff's claims for breach of contract, misrepresentation, violation of the Tennessee

Consumer Protection Act, common law suitability, and tying under the Bank Holding Company Act. The Court, however, found that Plaintiff's claims for breach of fiduciary duty, agency, and negligence survived dismissal on the narrow grounds that, were Plaintiff able to produce written agreements evidencing a fiduciary relationship, then Plaintiff would be able to state a claim under those causes of action. (Id.) This ruling applied to all of the Defendant entities. (Order Granting in Part and Den. in Part Pl.'s Mot. for Clarification and for Recons. of Dismissal of Pl.'s Intentional Misrepresentation and Tennessee Consumer Protection Act Claims.)

Through the present motion, Defendants move for summary judgment with respect to Plaintiff's surviving claims.

II. STANDARD OF REVIEW

Under Federal Rule of Civil Procedure 56(c), summary judgment is proper "if . . . there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The Supreme Court has explained that the standard for determining whether summary judgment is appropriate is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242,

251-252 (1989).

So long as the movant has met its initial burden of "demonstrat[ing] the absence of a genuine issue of material fact," Celotex, 477 U.S. at 323, and the nonmoving party is unable to make such a showing, summary judgment is appropriate. Emmons v. McLaughlin, 874 F.2d 351, 353 (6th Cir. 1989). In considering a motion for summary judgment, "the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." Kochins v. Linden-Alimak, Inc., 799 F.2d 1128, 1133 (6th Cir. 1986); see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249.

III. ANALYSIS

Defendants have moved the Court for summary judgment with respect to Plaintiff's claims under the theories of breach of fiduciary duty, agency, and negligence. The Court will address each of these claims in turn.

A. Fiduciary Duty

Plaintiff alleges that the Defendant entities breached a fiduciary duty owed to Plaintiff. "A fiduciary relationship has been defined as 'one founded on trust or confidence reposed by

one Person in the integrity and fidelity of another." First Tennessee Bank National Assn. v. C.T. Resorts CO., Inc., 1995 Tenn. App. LEXIS 580, *15 (Tenn. Ct. App. 1995) (citing Black's Law Dictionary 625-26 (6th ed. 1990)⁴). Fiduciary duties constitute the highest standard of duty imposed by law. Id.

⁴ Black's Law dictionary provides the following definitions: fiduciary. A person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor <the corporate officer is a fiduciary to the corporation>. 2. One who must exercise a high standard of care in managing another's money or property <the beneficiary sued the fiduciary for investing in speculative securities>.

fiduciary duty. A duty of utmost good faith, trust, confidence, and candor owed by a fiduciary (such as a lawyer or corporate officer) to the beneficiary (such as a lawyer's client or a shareholder); a duty to act with the highest degree of honesty and loyalty toward another person and in the best interests of the other person (such as the duty that one partner owes to another).

fiduciary relationship. A relationship in which one person is under a duty to act for the benefit of another on matters within the scope of the relationship. • Fiduciary relationships -- such as trustee-beneficiary, guardian-ward, principal-agent, and attorney-client -- require an unusually high degree of care. Fiduciary relationships usually arise in one of four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer.

(Black's Law Dictionary, 8th Ed. 2004)

"Tennessee law generally does not impose fiduciary or other special duties on banks with respect to their customers." First Tennessee, 1995 Tenn. App. LEXIS 580 at *15 (citing Domestic Sewing Mach. Co. v. Jackson, 83 Tenn. 418 (Tenn. 1885));⁵ see also Glazer v. First Am. Nat'l Bank, 930 S.W.2d 546, 550 (Tenn. 1990) (explaining that under Tennessee law, a bank has no fiduciary duties with respect to the debtor/creditor relationship); Oak Ridge Precision Industries, Inc. v. First Tennessee Bank Nat'l Ass'n, 835 S.W.2d 25, 30 (Tenn. Ct. App. 1992) ("Although fiduciary relationships may arise whenever confidence is reposed by one party in another who exercises dominion and influence, the dealings between a lender and borrower are not inherently fiduciary absent special facts and circumstances."))

Plaintiff contends that Defendants established a fiduciary relationship with Plaintiff through their course of dealings with Plaintiff. In particular, Plaintiff contends that Defendants SunTrust Bank-Nashville and SunTrust Equitable Securities represented to Plaintiff that they were acting as Plaintiff's advisor with respect to the 1999 and 2000 Swap Agreements. (Pl.'s Third Am. Compl. ¶¶ 46 and 54.) Plaintiff alleges that

⁵ Plaintiff has cited no cases under Tennessee law, and the Court has found no such cases, supporting the proposition that a bank owes a fiduciary duty under facts similar to the instant case.

Defendants then breached this fiduciary duty with respect to the 1999 and 2000 Swap Agreements. Plaintiff also contends that the 1999 and 2000 Swap Agreements were inappropriate and unsuitable for Plaintiff and that Defendants did not evaluate the appropriateness of or risk involved in either swap transaction. Plaintiff contends that Defendants breached a fiduciary duty by recommending that Plaintiff enter into the 1999 and 2000 Swap Agreements because these transactions were not appropriate for Plaintiff.

In its December 27, 2004, dismissal order, the Court found that Plaintiff's claim for breach of fiduciary duty survived dismissal on the narrow grounds that "should Plaintiff present sufficient facts to evidence a fiduciary relationship embodied in a writing, Defendants may have owed Plaintiff a fiduciary duty with respect to the 1999 and 2000 Swap Agreements." (Order Granting in Part and Den. in Part Defs.' Mot. to Dismiss of Dec. 27, 2004 at 11-12 (Docket No. 236).) This ruling applied to all of the Defendant entities. (Order Granting in Part and Den. in Part Pl.'s Mot. for Clarification and for Reconsideration of Dismissal of Pl.'s Intentional Misrepresentation and Tennessee Consumer Protection Act Claims.) The Court has determined that under Tennessee law, the facts and circumstances of this case do not give rise to a fiduciary relationship as a matter of law. (Id.) The Court based the determination that Plaintiff must

present evidence of a fiduciary relationship embodied in a writing on Tennessee law, which disfavors finding a fiduciary relationship between a bank and its customers, and on contracts and other writings disavowing the existence of a fiduciary relationship between the parties.

In its December 27, 2004, Dismissal Order, the Court expressly considered the following contractual language from the 1999 and 2000 Swap Agreements:

SunTrust acts as principal only and does not act as advisor, agent, broker, or fiduciary for or with respect to any counterparty (unless otherwise expressly agreed in a written engagement letter).

....

In entering into any OTC risk management transaction, you should take into consideration that, *unless you and SunTrust have established in writing an express financial advisory or other fiduciary relationship or you and SunTrust have expressly agreed in writing that you will be relying on SunTrust's recommendations as the primary basis for making your trading or investment decisions*, SunTrust is acting solely in the capacity of an arm's-length contractual counterparty and not in the capacity of your financial advisor or fiduciary.

(Pl.'s Third Am. Compl. Ex. F at PT/S000038-39 and Ex. H at PT/S000092-93 (Docket No. 180) (emphasis added).) This language contemplates that the SunTrust entities may, at times, undertake fiduciary relationships, but that such relationships must be established in writing.

The Court also reviewed the Restated Security Agreement entered into between Plaintiff and Defendant SunTrust

Bank-Nashville in November of 1998, which concerns the credit arrangement between the parties related to the swap transactions. The Restated Security Agreement contains the following language:

No Fiduciary Relationship. Nothing contained herein or in any related document shall be deemed to create any partnership, joint venture or other fiduciary relationship between Agent and Borrower and/or any Lender Borrower for any purpose.

(Exs. to Defs.' Statement of Undisputed Facts at Ex. 352 at ST3228.) This contract expressly indicates that Defendant SunTrust Bank-Nashville does not stand as a fiduciary to Plaintiff with respect to the parties' debtor-creditor relationship. Further, the Restated Security Agreement is referenced in the Master Agreement governing the 1999 and 2000 Swap Agreements and incorporated into the 1999 and 2000 Swap Agreements.

The Court also assessed Plaintiff's contention that the SunTrust Entities gave Plaintiff a written proposal regarding the 1999 Swap transaction advising Plaintiff to enter into the 1999 Swap Agreement from Defendants. (Pl.'s Third Am. Compl. Ex. E.) A review of the proposal revealed that it is a presentation regarding swap transactions from Defendant Sun Equitable Securities containing the following language:

The ultimate decision to proceed with any transaction rests solely with the Company. SunTrust is not acting as the Company's advisor. Therefore, prior to entering into any proposed transaction, the Company should determine, without reliance upon SunTrust or its affiliates, the economic risks and merits, as well as

the legal, tax, and accounting characteristics and consequences of the transaction and that it is able to assume these risks.

(Id. at 10.) This language expressly disclaims the existence of a fiduciary relationship between the parties and plainly states that "SunTrust is not acting as the Company's advisor" with respect to the 1999 Swap transaction.

Defendants contend that they are entitled to summary judgment on Plaintiff's claim for breach of fiduciary duty because Plaintiff has failed to put forth any evidence of a written agreement evidencing a fiduciary relationship. Plaintiff continues to assert that a fiduciary relationship was created because Defendants acted as Plaintiff's advisor and influenced, recommended, and urged Plaintiff to enter into various financial commitments and transactions. (Pl's Resp. to Defs' Mot. for Summ. J. and in Op. To Pl.'s Mot. for Partial Summ. J.)

Plaintiff has placed numerous documents in the record, but none of these documents support Plaintiff's contention that the parties had a fiduciary relationship. (Pl.'s Exs. to Resp. to Defs.' Mot. for Summ. J. and in Op. to Pl.'s Mot. for Partial Summ. J. and Pl.'s Resp. to Defs.' Statement of Undisputed Facts as to Which There is No Genuine Issue to Be Tried. at Coll. 1 and Coll. 6)

For example, Plaintiff introduces letters from SunTrust to Plaintiff which refer to the parties as "financial partners" and

in a "business relationship" and explains that Defendants sought to help Plaintiff understand Defendants "capabilities and capacity to assist you and the company in managing interest rate risk and growing credit needs." (Id. at Coll. 6 at ST2360 and 2362.) Plaintiff also relies on statements in sales presentations made to Plaintiff in 1996 and 1997.⁶ However, the Court finds that the statements in the presentations are not sufficient to create a genuine issue of material fact regarding whether Defendants owed a fiduciary duty to Plaintiff as a matter of law.

Having reviewed the record in the light most favorable to Plaintiff, the Court finds that Plaintiff has failed to present sufficient facts to establish that a genuine issue of material fact exists regarding whether a fiduciary relationship between the parties existed. In particular, Plaintiff has not presented any evidence that the parties stand in a fiduciary relationship

⁶ The 1996 and 1997 sales presentations given to Plaintiff by Defendant SunTrust Capital Markets include statements such as:

Advisory Service. A desire to act as a financial advisor, not just a placement service.

Commitment. Senior Specialists will assist the client throughout the process helping them structure a marketable transaction that best meets the company's needs.

Follow-Through. We stay involved with the client after the transaction is completed, thereby facilitating conversation regarding future transactions and reinforcing our role as financial advisor.

(Pl.'s Third Am. Compl. Ex. A at S1218 and S1222 and Ex. B at S1490 and S1494.)

that is embodied in a writing. Plaintiff does not point to any evidence that Defendants entered into a written agreement with Plaintiff to acts as a fiduciary. Therefore, Plaintiff's claim for breach of fiduciary duty must fail. Accordingly, the Court GRANTS Defendants' motion for summary judgment with respect to Plaintiff's claim for breach of fiduciary duty.

B. Agency

Plaintiff contends that the Defendant SunTrust Entities were express and implied actual agents for Plaintiff in regard to its banking and financial decisions. (Pl.'s Third Am. Compl. ¶ 87) Plaintiff further asserts that, as agents, Defendants owed Plaintiff a fiduciary duty. However, Plaintiff has neither alleged that Defendants had the authority to make decisions on behalf of Plaintiff nor pointed to evidence in the record to support any such contention. In addition, the Court has determined that Defendants did not owe Plaintiff a fiduciary duty. Accordingly, the Court GRANTS Defendants' motion for summary judgment with respect to Plaintiff's claim under a theory of agency.

C. Negligence

To sustain an action for negligence, a plaintiff must demonstrate: (1) a duty of care owed by the defendant to the plaintiff; (2) conduct by the defendant falling below the applicable standard of care that amounts to a breach of that

duty; (3) an injury or loss; (4) causation in fact; and (5) proximate, or legal, causation. Staples v. CBL & Assocs., Inc., 15 S.W.3d 83, 89 (Tenn. 2000). "The existence or nonexistence of a duty owed to the plaintiff by the defendant is entirely a question of law for the court." Bradshaw v. Daniel, 854 S.W.2d 865, 869 (Tenn. 1993). In determining whether a duty is owed, courts consider "whether the interest of the plaintiff which has suffered invasion was entitled to legal protection at the hands of the defendant." Id. at 869-70 (quoting Lindsey v. Miami Dev. Corp., 689 S.W.2d 856, 859 (Tenn. 1985)). "A decision by the court that, upon any version of the facts, there is no duty, must necessarily result in judgment for the defendant." Id.

Plaintiff's claim for negligence is grounded in its contention that Defendants negligently recommended the 1999 and 2000 Swap Agreements and subsequently failed to monitor or supervise the 1999 and 2000 Swap Agreements. Plaintiff asserts that Defendants Plaintiff also asserts that Defendants "expressly assumed a duty to act as [Plaintiff's] financial advisor and ... recommend only 'appropriate' derivatives." (Pl.'s Third Am. Compl. ¶ 91.) In support of its contentions, Plaintiff asserts that Defendants owed a duty of care to Plaintiff and provided negligent recommendations and advice with respect to the 1999 and 2000 Swap Agreements. In particular, Plaintiff contends that through experts it has established that "appropriateness" is the

standard of care owed by Defendants to Plaintiff and that Defendants breached that "duty."⁷ Plaintiff further contends that it is entitled to summary judgment because Defendants have not rebutted the "customer appropriateness standard" advanced by Plaintiff.

The only recognized legal duty that Plaintiff alleges Defendants owed them is a fiduciary duty. Plaintiff has cited no legal authority regarding any duty of "appropriateness" that indicates that such a duty exists. The Court has already determined that Defendants were not a fiduciary to Plaintiff and did not owe Plaintiff a fiduciary duty. Accordingly, the Court GRANTS Defendants' motion for summary judgment with respect to Plaintiff's claim for negligence.

D. Indemnification

In their motion, Defendants also moved offensively for summary judgment regarding their counterclaims for indemnification asserted in Defendants' Answer and Counterclaim, filed January 10, 2005 (Docket No. 252). However, Plaintiff had previously moved to dismiss Defendants' counterclaims. The Court will address whether Defendants' counterclaims for indemnification should be dismissed, and if not, whether

⁷ Plaintiff contends that expert testimony is required to determine the standard of care relevant to "market professionals" and that through experts Plaintiff has established a *prima facie* case that Defendants owed a duty to Plaintiff. Plaintiff has cited no legal authority in support of this position.

Defendants' are entitled to summary judgment regarding those counterclaims, in a separate order.

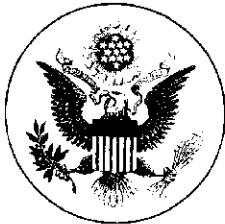
IV. CONCLUSION

For the foregoing reasons, Defendants' Motion for Summary Judgment is GRANTED regarding Plaintiff's claims against all Defendants. Plaintiff's claims against all Defendants are therefore DISMISSED with prejudice.

So ORDERED this 10 day of May, 2005.



JON P. McCALLA
UNITED STATES DISTRICT JUDGE



Notice of Distribution

This notice confirms a copy of the document docketed as number 327 in case 2:03-CV-02217 was distributed by fax, mail, or direct printing on May 16, 2005 to the parties listed.

Sara Margaret Falkinham
ARMSTRONG ALLEN, PLLC
80 Monroe Avenue
Ste. 700
Memphis, TN 38103-246

S. Lawrence Polk
SUTHERLAND ASBILL & BRENNAN LLP
999 Peachtree Street N.E.
Atlanta, GA 30309-399

Cannon F. Allen
ARMSTRONG ALLEN, PLLC
80 Monroe Avenue
Ste. 700
Memphis, TN 38103-246

John C. Speer
BASS BERRY & SIMS PLC
100 Peabody Place
Ste. 900
Memphis, TN 38103

Elena C. Parent
SUTHERLAND ASBILL & BRENNAN LLP
999 Peachtree Street N.E.
Atlanta, GA 30309-399

Honorable Jon McCalla
US DISTRICT COURT